

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

To be Argued by :
PHILIP B. ABRAMOWITZ

77-2084

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

LEONARD FAMBO,
Petitioner-Appellant,
v.

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility,
Respondent-Appellee.

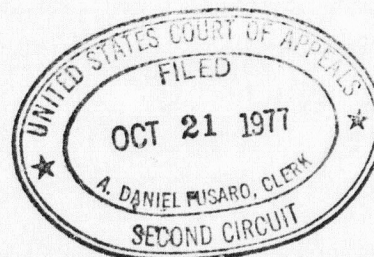
ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF NEW YORK.

REPLY BRIEF OF APPELLANT

PHILIP B. ABRAMOWITZ, Esq.,
ROBERT C. MACEK, Esq.,
2600 Main Place Tower,
Buffalo, New York 14202,
Telephone No.: (716) 854-4300,
Attorneys for Appellant.

Of Counsel:
GROSS, SHUMAN, LAUB & DAVID.

BATAVIA TIMES, APPELLATE COURT PRINTERS
A. GERALD KLEPS, REPRESENTATIVE
80 CENTER ST., BATAVIA, N. Y. 14020
716-343-0487



UNITED STATES COURT OF APPEALS
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LEONARD FAMBO

Petitioner-Appellant

-vs-

REPLY BRIEF

HAROLD J. SMITH, Superintendent
Attica Correctional Facility

Respondent

The Attorney General argues in his Answering Brief that the prosecutor had no duty to disclose to the defense that the dynamite that the Defendant was accused of possessing was not dynamite but was in fact sawdust, because

"The prosecutor had no duty to disclose information which did not raise a reasonable doubt as to [the defendant's] guilt." (Appellee's Brief, page 9)

Apparently, English is not the Attorney General's mother tongue and he has taken his lessons in our language from Humpty Dumpty who informed Alice in Wonderland

"When I use a word, it means just what I choose it to mean--neither more nor less." Alice's Adventures in Wonderland, Lewis Carroll, Clarkson N. Potter, Inc., page 269.

That sawdust is dynamite might make sense in Wonderland where words mean whatever one chooses them to mean but can make no sense in a Court of law where reason and justice must be controlling.

At the very least, the Petitioner would argue that a reasonable doubt would exist in the minds of all reasonable men, as to whether or not dynamite and sawdust are the same

substances.

If this be so, then clearly there was a duty on the part of the prosecutor to disclose that information to the defense, even though no request was specifically made for exculpatory information.

"...if the evidence is so clearly supportive of a claim of innocence that it gives the prosecutor a notice of a duty to produce, that duty should arise even if no request is made." U.S. v. Agurs, 96 S.Ct. 2392 at 2399 (1976).

The Attorney General in his brief also attempts to translate the deception of the prosecutor into a mere misstatement on his part that the defendant could have received a maximum possible term of imprisonment of 40 years not 50 years, had he been convicted on both counts. Our point, however, is that during the plea negotiations, the prosecutor had the duty not to misrepresent to the defense that there was dynamite not sawdust in the tube--or else the plea cannot be considered to be "voluntary".

"The standard as to the voluntariness of a plea must...[prohibit]...misrepresentation." Brady v. U.S., 397 US 742 at 755.

The Attorney General also argues in his brief that

"The undisclosed information, however, does not exonerate the petitioner. It leaves untouched the first count, charging a B felony with a maximum sentence of twenty five (25) years. Similarly, the undisclosed information does not eliminate the second count. The petitioner could still have been convicted of attempting the substantive offense...[and] The Petitioner pled guilty to a single, lesser included offense. There is no support in the

undisclosed information for the proposition that the petitioner is innocent of that charge." (Appellee's Brief, page 7 and 10)

What the Attorney General attempts to do by his language is to shift to the defendant the burden of proving himself innocent. But the law requires the Attorney General to show that even without the nondisclosure there is enough evidence in the record to find the defendant guilty. As the Court stated in Agurs

"The proper standard of materiality...is... in the context of the entire record [is there] evidence establishing guilt beyond a reasonable doubt." 96 S.Ct. at 2401-2402.

In Agurs the Supreme Court upheld the District Judge's refusal to vacate the conviction because

"...he evaluated the significance of Sewell's prior criminal record [the nondisclosed material] in the context of the full trial [and]...after considering it in the context of the entire record, the trial judge remained convinced of respondent's guilt beyond a reasonable doubt." 92 S.Ct. at 2402.

In this case because the conviction was not by trial but by plea, we must look to the plea proceedings to see if there is enough evidence to show the petitioner's guilt beyond a reasonable doubt. There is not. See record of proceedings (72-74).

In sum, the point is not whether the defendant could have received 40 years or 50 years or 140 years or 150 years had he been convicted on all counts. The point is that this record is absolutely barren of any evidence

proving the defendant's guilt beyond a reasonable doubt,* and that the plea was induced by the misrepresentation of the prosecutor. Agurs requires evidence in the record to prove beyond a reasonable doubt that the defendant was guilty, and Brady v. U.S., supra, requires that a guilty plea not be induced by the "misrepresentation" of the prosecutor 397 U.S. at 755.

The Attorney General has failed to show that there is proof in the record establishing the defendant's guilt beyond a reasonable doubt and has clearly failed to show that the guilty plea was not induced by the misrepresentation of the prosecutor.

*The whole tone of the prosecution's brief in this court and in the courts below is that the defendant received an excellent plea and that it would be unfair for him now to come back and attack it. One wonders why the prosecution in this case would have been so quick to give Leonard Fambo, a prior multiple felon, who had been labeled "organized crime" such an excellent plea unless the prosecution had a very weak case. Significantly, the prosecution has never volunteered to reveal its evidence, even in camera, to any court.

DATED: Buffalo, New York
October 20, 1977

Respectfully submitted,

Philip B. Abramowitz, Esq.
Robert C. Macek, Esq.
2600 Main Place Tower
Buffalo, New York 14202
Telephone No. (716) 854-4300

Attorneys for Appellant

Of Counsel

GROSS, SHUMAN, LAUB & DAVID

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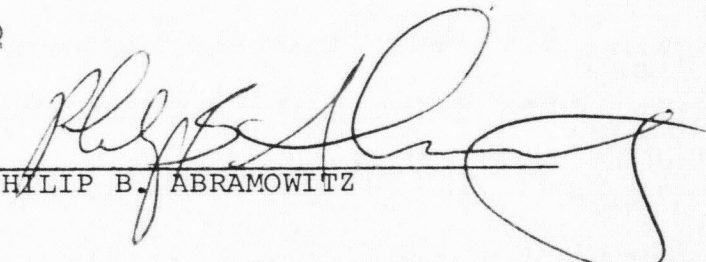
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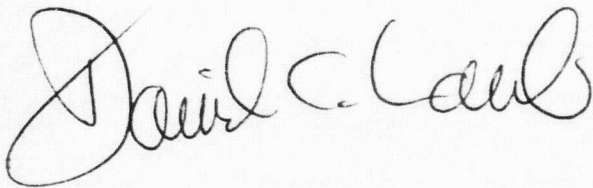
HAROLD J. SMITH, Superintendent,

Respondent-Appellee.

I certify that I have mailed two copies of the enclosed
Reply Brief to the Attorney General, Two World Trade Center, New
York, New York 10047 *on 10/20/77*



PHILIP B. ABRAMOWITZ



DAVID C. LAUB
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1978 *78*

10/20/77